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No. 06-562

**In the**
**SUPREME COURT OF THE UNITED STATES**

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UNITED STATES OF AMERICA,
*Petitioner,*

v.

ATLANTIC RESEARCH CORPORATION,
*Respondent.*

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On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

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# BRIEF OF AMICUS CURIAE AVIALL SERVICES, INC. IN SUPPORT OF RESPONDENT

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## STATEMENT OF INTEREST

Amicus curiae Aviall Services, Inc., is a party in a case before the United States Court of Appeals for the Fifth Circuit: *Aviall Services, Inc. v. Cooper Industries, Inc.*, No. 06-10996 (5th Cir. docketed Sept. 18, 2006). The issue that Aviall intends to raise in that appeal is the very issue presented by petitioner United States of America in the present case before this Court. Both the United States and the respondent, Atlantic Research Corporation, have consented to Aviall's submission of this amicus brief, and those parties' written consent is submitted herewith.

Counsel for Aviall authored this brief in whole. No person or entity other than Aviall made a monetary contribution to preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

The Court of Appeals for the Eighth Circuit held that persons who are themselves potential liable parties under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§ 9601-9675 (West 2005) (CERCLA), but who are not eligible to sue under section 113(f) of the Act, have a right of cost recovery under section 107 of the Act. The court held that this cause of action arises under the express language of section 107(a)(4)(B) or, alternatively, as an implied right of contribution. Aviall submits this brief in support of the court of appeals' conclusion that a right of cost recovery arises under the plain language of section 107(a)(4)(B).

Under CERCLA section 107(a), an enumerated group of potentially responsible parties (PRPs) are liable for response costs incurred by (A) the United States, states, or Indian tribes, or (B) "any other person." Since PRPs are themselves "persons" under the statute, the plain meaning of this provision is that an individual PRP is liable to the government entities or any other "person" – including other PRPs.

The word "other" in clause (B) simply acts to distinguish the persons eligible to sue under clause (B) from the class of government entities, themselves defined as persons, entitled to sue under clause (A). This construction is consistent with the structure of CERCLA since the government "persons" suing under clause (A) have a lighter burden of proof than the "other" persons that must sue under clause (B).

The legislative history of CERCLA supports this construction. The amendments that inserted the word "other" in clause (B) also added "United States" to the definition of "person." Thus, the reference to "other" person can be seen as a simple drafting revision necessitated by the inclusion of the United States within the class of "persons." Nothing in the legislative history indicates that the inclusion of the word "other" was intended to fundamentally alter the scope of liability under CERCLA. Indeed, in the first twenty-five years following adoption of CERCLA, no court construed section 107(a)(4)(B) to exclude PRPs, and the Government indeed cites no case law supporting its construction of the statute.

## ARGUMENT

### I. THE PLAIN LANGUAGE OF SECTION 107(A)(4)(B) AUTHORIZES COST RECOVERY BY ANY PERSON OTHER THAN CERTAIN GOVERNMENT ENTITIES.

CERCLA section 107 provides that an enumerated list of persons described in subsection 107(a)(1)-(4)—persons usually referred to as "potentially responsible parties" or "PRPs"—shall be liable for:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.

42 U.S.C.A. § 9607(a)(4) (West 2005). The question in this case is whether the "other person" referred to in subsection (B) above can be a person who is a PRP. The Government concedes that, but for the inclusion of the word "other" in the phrase "any other person," section 107(a)(4)(B) would "unambiguously" authorize a cause of action by a PRP. Brief for the United States at 19. Thus, the Government's entire argument hinges on their interpretation of this word.

The Government argues that the word "other" in the phrase "any other person" in subsection (B) distinguishes those persons authorized to seek cost recovery from "the universe of persons who fall into the four categories enumerated in Section 107(a)(1)-(4)." Brief for the United States at 15. In other words,

the Government would rewrite section 107(a)(4)(B) to provide a right of cost recovery "to any person other than a PRP." The Government says this interpretation is the "most natural reading" of section 107(a). Brief for the United States at 15.

But the Government's reading is actually quite "unnatural" and is inconsistent with the plain language of this section. On its face, section 107(a)(4)(B) provides that a PRP is liable to "any other person." "Person" is broadly defined in CERCLA section 101 to include, among others, individuals, corporations, the United States government, and a state. *See* 42 U.S.C.A. § 9601(21) (West 2005).[1] Thus, section 107(a)(4)(B) simply provides that those persons who are PRPs are liable to any other "individual, firm, corporation," etc., who has properly incurred response costs.

Furthermore, the most natural construction of the reference to "other" persons in section 107(a)(4)(B) is to distinguish the "persons" with a right of cost recovery under subsection (B) from the government entities with a right of cost recovery under subsection (A). Indeed, the statute's language compels this construction. The

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[1] Section 101(21) defines ``person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C.A. § 9601(21) (West 2005).

Although this definition does not expressly include "Indian tribes," other provisions of CERCLA refer to Indian tribes as "persons." *See, e.g.*, 42 U.S.C.A. § 9607(i), (j) (West 2005). The reference to "Indian tribes" in the class of government entities in section 107(a)(4)(A), was added by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 207(c)(1), 1986 U.S.C.C.A.N. (100 Stat.) 1613, 1705.

governmental entities specified in (A), including the United States and the states, are specifically defined as "persons" in section 101 of the Act. Therefore, it is necessary to distinguish between those "persons" (government entities) who may bring a lawsuit under subsection (A) from all "other" persons who may bring a lawsuit under subsection (B). In short, subsection 107(a)(4)(A) establishes liability to Person A (the United States) and to Person B (a State or Tribal authority), while subsection 107(a)(4)(B) establishes liability to "any other person."

Such a construction is consistent with the structure of CERCLA. Under subsection (A), the government entities are entitled to recover their response costs if those costs are "not inconsistent" with the national contingency plan ("NCP"). In contrast, under subsection (B) all persons other than government entities are entitled to recover their response costs only if those costs are "consistent" with the NCP.

This difference in language has significant consequences. For government cost recovery under subsection (A), the burden of proof is on the defendant to show that the government costs were not consistent with the NCP. For cost recovery by all other parties, the burden of proof is on the plaintiff to show their costs were consistent with the NCP. *See, e.g., United States v. E.I. DuPont De Nemours & Co.*, 432 F.3d 161, 178 (3d Cir. 2005) (en banc); *Washington State Dep't of Transp. v. Washington Natural Gas Co.*, 59 F.3d 793, 799-800 (9th Cir. 1995). Thus, Congress imposed a lighter burden for cost recovery by government entities than they did for "other persons."

This construction of the phrase "other person" is adopted by the Seventh Circuit in *Metropolitan Water*

*Reclamation District of Greater Chicago v. North American Galvanizing and Coatings, Inc.*, 473 F.3d 824, 835 (7th Cir. 2007) (reading "other" as distinguishing "any other person" from the United States, a state, or an Indian tribe as listed in preceding subsection (A)); the Second Circuit in *Consolidated Edison Co. of New York, Inc. v. UGI Utilities, Inc.*, 423 F.3d 90 (2d Cir. 2005), *pet. for cert. pending*, No. 05-1323 (U.S. filed Apr. 14, 2006); and the Eighth Circuit, *Atlantic Research Corp. v. United States*, 459 F.3d 827 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 1144 (U.S. Jan. 19, 2007).

The Government, however, claims that the language of section 107(a) "definitively forecloses" this obvious interpretation. Brief for the United States at 20. Under section 107(a)(4)(B), persons are entitled to recover "any other necessary costs of response . . ." The Government, quite properly, states that this refers to costs other than those incurred by the government entities specified in 107(a)(4)(A). The Government asserts that the reference to "other" costs would be superfluous if "other persons" were construed to refer to persons other than government entities.

That assertion artificially constricts the flexibility of the English language—even as used in Congressional legislation. It is hardly an odd construction to state that PRPs, in addition to being liable for certain costs incurred by government entities, are also liable for any "other" costs incurred by persons "other" than the government. This repetition of the word "other" raises no eyebrows; it is a sensible enough English sentence.

More important, the legislative history discussed below explains why both uses of the word "other" occur in section 107(a)(4)(B). *See infra* section II.

## II. THE LEGISLATIVE HISTORY OF CERCLA SUPPORTS THIS CONSTRUCTION

The clear and straightforward construction of the phrase "any other person" in subsection 107(a)(4)(B) to include all persons other than the government entities specified in subsection 107(a)(4)(A) does not require resort to legislative history. Nonetheless, legislative history supports this construction.

The legislative history of CERCLA is confused, but certain aspects of this history are clear. Senate Bill 1480 in the 96th Congress was the U.S. Senate's vehicle for enactment of what ultimately became CERCLA. The original version of S. 1480 was replaced in its entirety by a version introduced by Senator Stafford and managed on the floor by Senator Randolph. *See* 126 Cong. Rec. S14988 (Nov. 24, 1980). This new version of S. 1480, called the "Stafford/Randolph" substitute, ultimately became the final version of CERCLA. 126 Cong. Rec. S15009 (Nov. 24, 1980); *see* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 21 (1982).

As the Government notes, the original version of S. 1480 authorized cost recovery by the United States Government or a State, and "any person." Brief for the United States at 18-19. Under section 4 of this original version, PRPs were liable for (a) certain costs incurred by "the United States or a State" or (b) "any other costs" incurred by "any person." *See* S. 1480, 96th Cong. § 4(a)(1)(B) (as reported by S. Fin. Comm., Nov. 18, 1980). The Government concedes that, pursuant to this language, PRPs "unambiguously" would have had a cause of action. Brief for the United States at 19.

Yet this language was subsequently amended, and, under the Stafford/Randolph substitute, PRPs were liable to the United States Government, or a State or any "other" person. The Government states that there is no explanation for this change in the legislative history, and it asserts that the "only plausible explanation" for insertion of the word "other" is to exclude PRPs from bringing suit under CERCLA.

The Government does not, however, fully describe the changes made by the Stafford/Randolph substitute. Under the original version of S. 1480 (the version which allowed cost recovery by the United States, a State or "any person") the definition of "person" did not include the United States.[2] The Stafford/Randolph substitute (as does CERCLA today) defined person to specifically include the United States. The "plausible" explanation is that, with the inclusion of the United States in the definition of persons, the addition of the word "other" was a simple drafting issue necessary to clarify that the persons eligible to sue under subsection

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[2] In the original version of S. 1480, the word "person" was defined by referring to the definition in section 502 of the Clean Water Act. *See* S. 1480, 96th Cong. § 2(2) (as reported by S. Fin. Comm., Nov. 18, 1980) ("the terms 'State', 'person', 'navigable waters', and 'territorial seas' shall have the meaning provided in section 502 of the Clean Water Act"). Then, as now, the definition of "person" in section 502 of the Clean Water Act did not include the United States. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 502(5), 1972 U.S.C.C.A.N. (86 Stat. 816) 951, 1036 (renamed Clean Water Act of 1977, Pub. L. No. 95-217, 1977 U.S.C.C.A.N. (91 Stat.) 1566) (codified as amended at 33 U.S.C.A. § 1362(5) (West 2001)) (defining ``person" to mean "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body").

(a)(4)(B) were different from the persons (now defined to include the United States) authorized to sue under subsection (a)(4)(A).[3]

In the Senate debate, Senator Randolph described major changes made by the Stafford/Randolph substitute. Among the changes, he mentions deletion of the "Federal cause of action for medical expenses or property or income loss." 126 Cong. Rec. 14964 (Nov. 24, 1980). Nowhere here or elsewhere in the legislative history is there any indication that the inclusion of the word "other" in the Stafford/Randolph substitute was intended to limit a right of cost recovery by PRPs that the Government admits would otherwise have "unambiguously" existed.

Nor would it be plausible for Congress to have fundamentally altered the scope of CERCLA through the otherwise unremarked inclusion of the word "other." As Justice Scalia has noted: "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *See Whitman v. American Trucking*, 532 U.S. 457, 469 (2001). Few elephants are larger than precluding PRPs from

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[3] This also explains why subsection 107(a)(4)(B) contains a reference to "other" costs. The original version of S. 1480 imposed liability for "any other costs" incurred by "by any person." *See* S. 1480, 96th Cong. § 4(a)(1)(B) (as reported by S. Fin. Comm., Nov. 18, 1980) (providing liability for "any other costs or expenses incurred by any person to remove a hazardous substance as the terms 'remove' or 'removal' are defined in section 311(a)(8) of the Clean Water Act"). Although the inclusion of the United States within the definition of "person" required the change to "any other person," there was no need to revise the existing reference to "any other costs."

seeking cost recovery following a proper cleanup; few mouseholes are tinier than the government's narrow reading of the word "other."[4]

## III. The Government Provides No Authority For Its Construction of Subsection 107(a)(4)(B)

The Government argues that the word "other" excludes the class of PRPs from the persons who are otherwise eligible to bring a cost recovery action under section 107(a)(4)(B). The Government's entire "plain language" argument is contained in the syllogism that introduces their argument on this issue. According to the Government:

- PRPs, the universe of persons specified in section 107(a)(1)-(4), are liable to "any other person."
- PRPs are themselves a "person."
- Therefore, the phrase "any other person" excludes the "persons" that are the subject of the sentence.

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[4] In support of their construction of subsection 107(a)(4)(B), the Government cites a sentence from *Jama v. Immigration Services*, 543 U.S. 335, 343 n.3 (2005). Brief for the United States at 15. As discussed below, the statutory construction issues raised by *Jama* are different from those involved in this case, and *Jama* provides no support for their interpretation. Nonetheless, we do note that Justice Scalia rejected an argument that an amendment, inserting the word "another" in the phrase "another country," should be construed to have "momentous consequences." In *Jama* Justice Scalia concluded that other contemporaneous stylistic changes to the statute explained and minimized the significance of that specific change. Here, of course, other contemporaneous changes to CERCLA explain the insertion of the word "other" in the phrase "any other person."

*See* Brief for the United States at 15. The Government, of course, misstates the structure of section 107(a). Section 107(a) provides that PRPs are liable to both (A) persons who are government entities, and (B) any "other" person. The "other," as discussed above, quite clearly acts to distinguish the parties who can sue under (B) from those who can sue under (A).

But even if, as the Government mischaracterizes it, section 107 provided simply that a person who is a PRP is liable to "any other person," this would not support the leap of logic contained in the Government's "therefore." The obvious construction of such a phrase is that an individual PRP is liable to any other person - including other PRPs. The Government acknowledges the possibility of this construction, but it dismisses this argument with the claim that "the text of the statute" makes "all" PRPs, in the conjunctive, liable to "any other person." Brief for United States at 21 n.10.[5]

Section 107(a) does not, of course, state that "all" PRPs are liable to anyone. It specifies that an enumerated list of types of PRPs, linked in the conjunctive by "and," are liable. This use of the word

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[5] Only by somehow lumping all individuals who fall within the category of PRPs as a separate class of persons is the Government's argument even coherent. But if persons lose a right of cost recovery simply because they fall within the category of PRPs, the Government's reading produces absurd results. A corporation that owned some contaminated property (and thus fell within the category of PRPs) would lose a right of cost recovery relating to its cleanup of *other* properties that it had not contaminated. In other words, a person who was responsible for contamination at a site would not be liable under section 107(a)(4)(B) if the plaintiff happened to be a PRP at some other site elsewhere in the country. Nothing compels this odd construction.

"and" simply does not address the issue of whether individual PRPs are liable to "any other person," including other persons who are PRPs. Is the Government seriously suggesting that if the list of PRPs in section 107(a) were linked by the word "or," the scope of persons who could sue under section 107(a)(4)(B) would be fundamentally different?

In the twenty-five years following the adoption of section 107(a)(4)(B), not a single court held that the phrase "any other person" excludes PRPs.[6] Indeed, the Government provides only two citations in support of its remarkable "therefore." Curiously, these two cases, *Porto Rico Ry. Light & Power Co. v. Mor*, 253 U.S. 345 (1920), and *Jama v. Immigration Services*, 543 U.S. 335 (2005), reach conflicting conclusions on the simple question of whether a condition that is located at the end of a list of items should apply to all items on the list or only the last item. The sentences from the cases, plucked out of context by the Government, do not add support for the Government's position. The results in both of these cases are closely tied to the history and purpose of the specific statutes at issue. Neither case involves construction of statutes that are either syntactically or logically apt in interpreting CERCLA subsection 107(a)(4)(B).

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[6] Indeed, Aviall has not identified a single case in which this argument was even made before *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004).

## CONCLUSION

Aviall Services, Inc., supports the position of the respondent, Atlantic Research Corporation, that this Court affirm the court of appeals' judgment.

Respectfully submitted,

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